

## **PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated March 19, 2010 which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help to perform DLA.

## **PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2  
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

## PART E – SUMMARY OF FACTS

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of reconsideration was comprised of a PWD application (Self-report (SR), Physician Report (PR), and Assessor Report (AR)) and the Request for Reconsideration which included a February 20, 2010 3-page letter from the appellant and a 1-page undated letter from the appellant's roommate.

In the SR, the appellant writes that he has asthma for which he was taken by ambulance to the hospital 5 times in 2008, has had pericarditis twice for which he was hospitalized both times, and has severe disorientation and loss of balance about once every 2 months. When disoriented, the appellant reports that he cannot understand what people are saying; additionally, the appellant reports that he does not know how to use simple things like an alarm clock or oven and that when shopping, he forgets why he was at the store. He reports that his asthma gets bad once a month and that because of asthma and joint inflammation, he requires 2 hours upon waking before he can do anything like taking a shower or a walk, or vacuuming though, he can take care of himself if he spaces his time out.

In the PR a general practitioner who has seen the appellant once, diagnoses the appellant with autoimmune hepatitis, asthma, and joint inflammation/arthritis with the comment "According to patient's description. New patient". The physician writes that "according to the patient", he is unable to do heavy physical activities or climb more than 2 flights of stairs, is not confident to go out for more than a 10 minute distance from home or a hospital due to asthma, has mild elevation of liver enzymes, requires medication and specialized care, and has joint inflammation which restricts ADL's the first 2 hours of the day. Regarding Functional Skills, the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5 to 15 lbs and has no limitations remaining seated or difficulties with communication; significant deficits with 2 of 11 specified aspects of cognitive and emotional function are indicated (executive – "some problem in planning when doing grocery" and emotional disturbance – anxiety of having asthma attack). Regarding DLA, continuous restrictions are indicated for personal self care, basic housework, and mobility outside the home. Respecting the degree of restriction, the physician writes "unable to do vacuum cleaning due to asthma" and "unable to go too far away from home due to asthma/anxiety". Assistance needed with DLA is described as large handled utensils and a jar opener. Episodes of flare up in the long run are expected and medication may provide symptomatic relief and/or stabilize the condition though a complete cure is unlikely.

In the AR, completed and signed on June 2, 2009 by a nurse practitioner who has seen the appellant 2-10 times since April 2009, the assessor writes that the appellant reports bouts of joint inflammation and periods of exacerbation of asthma and autoimmune liver disease that interfere with DLA. The appellant's Ability to Communicate is reported as good. Respecting Mobility and Physical Ability, the assessor indicates that the appellant takes significantly longer walking indoors, walking outdoors, and climbing stairs and is independent lifting and carrying/holding; narrative includes "symptoms reported by pt." and "pt reports not being able to stand for long time, difficulty climbing SOB/pain". A major impact is noted for 5 aspects of Cognitive and Emotional Functioning (bodily functions – toileting problems/sleep disturbance, emotion – anxiety/depression/short tempered, attention/concentration, executive, and motor activity – co-ordination/lack of movement/agitation); either no or a minimal impact is indicated for the remaining 8 aspects. Regarding DLA, the appellant is reported to take significantly longer with all aspects of personal care, basic housekeeping, and

transportation and with 2 of 4 aspects of meals; the appellant is independent with all aspects of shopping, paying rent and bills, and medications. The assessor's narrative is that difficulties with DLA are due to problems with dexterity (grasping, grabbing, opening jars), pain, joint stiffness and difficulty understanding labels and directions. Regarding social functioning, the appellant requires periodic support/supervision with 3 aspects (appropriate social decisions, appropriately dealing with unexpected demands, and ability to secure assistance from others), continuous support/supervision with 1 aspect (interact appropriately with others) and is independent with the remaining aspect (develop and maintain relationships). Alienation from family and no friends are indicated as is past referral for mental health care though the appellant denies any mental health problems. A recent seizure is under investigation.

In a letter dated February 20, 2010 the appellant writes that his description of his disability in the Self-report is misleading. He writes that he is unable to perform DLA including shopping, meal preparation, and housework, and is reliant upon his roommate for assistance. He writes that he has difficulty breathing 22 out of 24 hours a day and that while he can climb 4+ steps about "2 times a day", the rest of the time he requires an aid.

In an undated letter, the appellant's roommate writes that the appellant has multiple medical conditions and also suffers from medication side effects. The roommate writes that the appellant has severe functional limitations making him unemployable and necessitating continuous and significant assistance from the roommate respecting social functioning, management of medications, paying rent and bills, and meals.

At the hearing, the ministry stated that the information provided did not establish how the impacts to cognitive and emotional functioning restricted the appellant's ability to perform DLA nor was there any indication how much longer the appellant took completing DLA. Therefore, the ministry found that the appellant's DLA are not impacted to a degree to establish a severe impairment or that his ability to manage DLA is directly and significantly restricted either continuously or periodically for extended periods necessitating help with DLA.

The panel makes the following findings of fact: (a) the appellant suffers from autoimmune hepatitis, asthma, and joint inflammation/arthritis; (b) a mental impairment or brain injury is not diagnosed; (c) the appellant has some functional skills limitations and takes significantly longer with some aspects of mobility and physical ability and with some DLA; and, (d) the appellant is unable to vacuum and the assistance of another person is indicated for social functioning with all other DLA performed independently.

## PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The appellant's position is that he is eligible for designation as a PWD because his impairment is severe and continuously restricts his ability to perform DLA necessitating the regular assistance of other people.

The ministry's position is that the evidence does not establish the existence of a severe physical or mental impairment that, in the opinion of a prescribed professional, significantly restricts DLA or necessitates help with DLA.

Regarding the existence of a severe mental impairment, the panel finds that the physician has not diagnosed the appellant with a mental impairment or brain injury though both prescribed professionals reference anxiety consequential to asthma and indicate deficits with some aspects of cognitive and emotional function, including anxiety, attention/concentration, and memory problems. The physician indicates significant deficits with 2 of 11 specified aspects of cognitive and emotional function. The assessor reports a major impact on daily functioning respecting 5 of 13 specified aspects though the assessor's narrative indicates that some impact (bodily functions and motor activity) is attributable to physical impairments, asthma and pain with movement, and the appellant's difficult living conditions. Therefore, as no mental impairment or brain injury is diagnosed, and the majority of aspects of cognitive and emotional function are not impacted, and some of those impacted relate to physical impairments, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Regarding the existence of a severe physical impairment, the panel finds that although there is evidence of

some restriction with aspects of mobility and physical ability, as the appellant takes longer with some aspects, the assessor has not specified how much longer or that any assistance is required and the physician indicates either no or moderate restrictions with functional skills. Therefore, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted, the panel finds that the evidence of the physician is that the appellant is continuously restricted with personal self care, basic housework and mobility outside the home with narrative that the appellant cannot vacuum due to asthma, cannot go too far from home due to asthma/anxiety and requires large handle utensils and a jar opener; no restrictions are indicated for the remaining 7 listed DLA. The evidence of the assessor is that the appellant is independent with all aspects of shopping, paying rent and bills, and medication and with 2 of 4 aspects of meals; the appellant takes significantly longer with all aspects of personal care, basic housekeeping, and transportation, and with 2 aspects of meals and 1 aspect of social functioning. Neither periodic nor continuous assistance/support of another person is indicated by the assessor for any DLA other than social functioning where periodic support is indicated for 3 aspects and continuous assistance for 1 aspect (interact appropriately with others). While the evidence of a prescribed professional has established what may be reasonably viewed as a significant restriction with one aspect of housekeeping, vacuuming, and one aspect of social functioning, as the evidence is that the appellant can walk 2 to 4 blocks and in the absence of information from the assessor respecting as to how much longer the appellant takes moving about indoors and outdoors, the panel finds that a significant restriction has not been established with mobility. Regarding personal self care, transportation and 2 aspects of meals, which the assessor indicates take significantly longer than typical to perform, the panel finds that, in the absence of evidence respecting how much longer than typical the appellant takes and as the appellant is reportedly able to independently perform these activities, a significant restriction has not been established by a prescribed professional. Based on the above evidence, the panel finds that the evidence of the prescribed professionals establishes a direct and significant restriction, which is continuous, with 1 activity of basic housekeeping, vacuuming, and 1 aspect of social functioning, and that the appellant is independently able to manage the majority of aspects of DLA, albeit with some difficulty. Therefore, the panel finds that the ministry reasonably determined that a direct and significant restriction of the appellant's ability to perform DLA, either continuously or periodically for extended periods, in the opinion of a prescribed professional, has not been established under section 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the panel finds that while the evidence of a prescribed professional indicates the need for large handled utensils, a jar opener, continuous assistance with vacuuming, and periodic or continuous assistance with aspects of social functioning, the evidence of the prescribed professionals is that the appellant manages most aspects of DLA independently without help. Therefore, as a direct and significant restriction with DLA, in the opinion of a prescribed professional, has not been established, the panel finds that the ministry reasonably determined that the evidence does not establish that, in the opinion of a prescribed professional, the significant help or supervision of another person, use of an assistive device or assistance animal is required to perform DLA which are directly and significantly restricted as required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's reconsideration decision is reasonably supported by the evidence and confirms the decision.